DOCUMENT RESUME

ED 075 949 EA 005 177

AUTHOR Fisher, James E.; Sealey, Ronald W.
TITLE The Analytical Pragmatic Structure of Procedural Due Process: A Framework for Inquiry in Administrative Decision Making.
PUB DATE Feb 73
NOTE 13p.; Paper presented at American Educational Research Association Annual Meeting (58th, New Orleans, Louisiana, February 26-March 1, 1973)

EDRS PRICE MF-$0.65 HC-$3.29
DESCRIPTORS *Administrative Problems; *Concept Formation; Conflict; Content Analysis; Decision Making; *Due Process; *Educational Administration; Ethics; Legal Responsibility; *Norms; Speeches
IDENTIFIERS Concept Structure

ABSTRACT

The study describes the analytical pragmatic structure of concepts and applies this structure to the legal concept of procedural due process. This structure consists of form, purpose, content, and function. The study conclusions indicate that the structure of the concept of procedural due process, or any legal concept, is not the same as the structure of scientific or moral concepts. Parts of the structure of legal concepts change in accordance with changing social and political norms, whereas other parts remain constant. The use of procedural due process in decisionmaking does not guarantee errorless judgment, nor does it guarantee a particular procedural requisite. (Edited copy may reproduce poorly.) (Author)

MAY 10 1973
12.08

EA

ED 075949

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
OFFICE OF EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY

For Presentation

to

1973 Annual Meeting of

American Educational Research Association

New Orleans

by

Dr. James E. Fisher

and

Dr. Ronald W. Sealey

Southern Illinois University

EA 005 177

FILMED FROM BEST AVAILABLE COPY

The Analytical Pragmatic Structure of Procedural Due Process:[1] A Framework for Inquiry in Administrative Decision Making

In today's society conflict among people is common. Conflict is the outcome of a disagreement about the norms, rules, standards, or principles being followed. Out of this kind of disagreement come questions like "What should be done?" and "What is the meaningful thing to do?" Out of this kind of disagreement come practical questions. A practical inquiry[2] is being made by these questions.

These questions have one thing in common. They are questions about what act to perform, i.e. about the right thing to do. They are appeals for norms that guide actions that are right or meaningful.

One place where people look for norms for guiding action is in the study of law.[3] Norms that contain legal concepts are expected to resolve disagreement among people. These norms are expected to resolve disagreement by people adhering to them.

One problem with adhering to a norm is that of understanding the meaning of the norm. Involved in the understanding of the meaning of a norm is the conceptualization[4] of it. In other words, to understand the meaning of a norm is to understand the structure of concepts expressed in the statement[5] of the norm.

Administrative decision making[6] in schools is becoming more involved with legal concepts. Educational administrators must attend to the meaning of the statement of legal norms and therefore to the structure of legal concepts expressed in the statement.

The goal of this paper is to state the analytical pragmatic structure of a concept as applied to the legal concept of procedural due process. An assumption underpinning the paper is that educational practitioners and theoreticians are not familiar with the structure of concepts whether they be legal, moral, or scientific concepts.

Sometimes the structure of a legal concept is mistaken to be the same as the structure of a scientific or moral concept. This mistake can cause indecision and wrong decisions in educational administrative decision making. Also, indecision and wrong decisions are an outcome of relying upon legal institutions' particular interpretive statements of legal norms more than upon the understanding of the general meaning of statements of legal norms. In either case what is needed is the understanding of the analytical pragmatic[7] structure of concepts.

The analytical pragmatic structure[8] of the legal concept of procedural due process consists of four characteristics: (1) Form; (2) Purpose; (3) Content; and (4) Function.

Form of the Concept of Procedural Due Process

Concepts are expressed by terms and they are formed by the language act of definition.[9] Literally, definition is the language act of substituting one term for several terms. A definition is a language contract in which people agree to use one term in short for a set of terms. It is in this language contractual act of definition that a concept takes form. The concept is then expressable by a single term that is chosen to be short for the set of terms that form the concept.

Consider the legal term 'procedural due process'. The term expresses

the concept and the definition of the term forms the concept. Usually the form of the concept of procedural due process, i.e. the definition of the term 'procedural due process', is not requested. Usually the term is just expressed. However, to understand the form of the concept is to understand the definition of the term that expresses it.

Consider this definition: Procedural due process is the method(s) of asserting and conducting disciplinary, punishment, or economic deprivation charges and proceedings fairly and openly, with full opportunity for legal rights and remedies to be sued by the party under attack.[10] Moreover, procedural due process guarantees no particular form of procedure and requires only such notice and hearing as are commensurate with the necessities of a particular case (factual context) and magnitude of the right(s) affected. It is a process for balancing competing interests or rights.[11]

In summary, the concept of procedural due process is formed by the combination of the concepts of method and fairness. Terms that express concepts similar to that expressed by the term 'method' is 'plan' and 'design'. Terms that express concepts similar to that expressed by the term 'fairly' is 'honesty' and 'impartiality'. The concept of procedural due process, then, is a concept formed out of the concepts of planning impartiality or designing honesty.

Purpose of the Concept of Procedural Due Process

The form of the concept of procedural due process is connected with its' purpose.[12] The purpose of a legal concept is to designate sanctions or remedy if certain acts are or are not performed and to cause individuals to perform or not to perform certain acts. In short, the purpose of a legal

concept is to designate punishment or remedy and to cause people to act in a certain way. ~~The purpose of the legal concept of procedural due process is to designate what is to happen by punishment or remedy if planned partiality or designed dishonesty occurs in schools and also to cause people in schools to plan for impartiality or to design for honesty.~~ The purpose of the legal concept of procedural due process, then, is two-fold. It is to both designate punishment or remedy and to ~~cause~~ incite people to plan or design impartiality and honesty. ~~However,~~ Moreover, the purpose of the concept of procedural due process is not a guarantee against the error of planned partiality and designed dishonesty.[13] As a society matures or realizes the purpose of procedural due process it accomodates for the social need and goal of honesty and impartiality.[14] ~~The~~ Furthermore, the purpose of the concept of procedural due process is dynamic. Out of it is intended to emerge in part a moral society.

The purpose of a legal concept compares and contrasts with the purpose of a moral concept. They both have in common the purpose of causing, persuading, directing, or guiding action or acquiescence. They both intend to incite or urge action or acquiescence in schools and elsewhere. The purposes differ, however, in that a legal concept does not have the purpose of appraising or evaluating the acts urged or incited. The purpose of appraising acts is that of a moral concept. The legal concept's purpose, other than inciting action or acquiescence, is that of designating or pointing out punishments or remedies for acts in schools not in accord with the action or acquiescence intended by the concept. Moral concepts intend to incite action or acquiescence in schools and to appraise acts.

The terms commonly used in connection with the purpose of a legal concept are 'legal' and 'illegal'. The terms commonly used in connection with the

purpose of a moral concept are 'good' and 'bad'.[15] It is possible for an act in schools to be bad as appraised by a moral concept and legal as designated by a concept of law. And, of course, it is possible for an act in schools to be legal and not moral.

The purpose of a scientific concept compares and contrasts with the purpose of a legal concept and of a moral concept. A scientific concept compares with a legal concept in that they both intend to designate something. A legal concept intends to designate punishment and remedy. A scientific concept intends to be designative by description. A legal concept, for example, designates what punishment or remedy is appropriate for an act in schools not in accord to the legal norm of procedural due process. A scientific concept, for example a concept in sociology of education, designates how many schools have policies in accord and not in accord with the legal concept of procedural due process. A legal concept designates punishment and remedy and a scientific concept designates schools having policies in accord and not in accord with the concept of procedural due process.

The legal concept of procedural due process intends to incite or urge someone to plan or design for honesty and impartiality. The scientific information or knowledge, that many schools are following the concept of procedural due process and many are not, is not per se incitive. People might use the information or knowledge to incite or urge action but this use of knowledge is itself an act in accord with the norm contained in the directive: persuade by knowledge. The assumption in the use of scientific knowledge for inciting, urging, or persuading action in schools, to be in accord with the concept of procedural due process, i.e. to plan or design

for honesty and impartiality, is that rationality[16] ought to be more persuasive than irrationality.

The purpose of a scientific concept does not compare with the purpose of a moral concept. As stated above, the purpose of a scientific concept is to designate something, i.e. to describe something, and to inform or impart knowledge. A moral concept intends to appraise or evaluate something as good or bad and to incite or urge actions or acquiescence in accord with what is appraised as good. Scientific concepts designate and inform but moral concepts appraise and incite.

In summary, then, it can be said that scientific concepts intend to designate how many schools have policies following the concept of procedural due process ~~designation.~~ Legal concepts intend to incite people in schools to act in accord with procedural due process and to designate punishment and remedy if acts are not in accord with procedural due process. Moral concepts intend to appraise acts in schools in accord with procedural due process as good and to incite ~~i.e.~~ to act in a good manner honest~~ly~~ and impartial~~ly.~~

Content of the Concept of Procedural Due Process

The content of the concept of procedural due process is all the cases or instances that have occured, are occurring, and will occur in which action in schools actually are extensions of the form of the concept. In other words, the content of this concept is the extension of the acts of planned impartiality or designed honesty. As stated earlier, the form of the concept of procedural due process is constituted by the concepts of planning or designing and honesty and impartiality. The form of the concept is constituted by the

words or concepts 'design' or 'plan' and 'honesty' or 'impartiality'. Words make the form of the concept. In language is found the purpose or intention of the concept. Acts in schools, in accord with the concept, are instances of, content of, or extensions of the concept.

One way to state the content or extension of the concept is to imagine cases of the concept on a continuum. The continuum can be perceived by imagining a model, paradigm, or ideal case of the concept at one pole, a contrary or not so ideal case at the other pole and a borderline case in between the two poles.[17] The continuum, then, has at one end of it a model case of the concept and at the other end of it a contrary case of the concept with a borderline case in between. The continuum is a means of discerning the content of the concept of procedural due process as acts in schools.

When developing the continuum one must first identify the nature of the rights or interests affected. These rights or interests range from de minimis to fundamental. In addition one must examine the particularities of the case. The following cases are predicated upon controversy which arose from alledged deprivation of substantial interests. These substantial interests are dismissal of a tenured teacher and explusion of a student.

Model Case:

A model case of the concept of procedural due process is of a tenured teacher[18] or a student afforded all of the following procedures: (1) removal for stipulated cause; (2) majority of all board members ~~must agree~~ agreeing; (3) written charges; (4) a bill of particulars; (5) hearing before board or school appointed committee; (6) notice 20 to 30 days before hearing; (7) eighty days from service of notice a decision ~~must be~~ rendered plus additional time for

continuances; (8) public hearing available at either teacher's, (student's) or board's request; (9) right to counsel; (10) opportunity to offer evidence; (11) right to cross-examine witnesses and present defense; (12) transcript of the proceeding; (13) if remediable, give reasonable warning at least 30 days in writing stating specific causes.

Borderline Case:

A borderline case of the concept is of a teacher or a student afforded the following procedures: (1) four days notice and (2) an administrative hearing which provided a forum for exchange of ideas between the primary parties.

Contrary Cases:

A contrary case of the concept ~~if~~ *is* of a tenured teacher summarily dismissed by a board of education or a student summarily expelled from a state college *at the suggestion of the state governor,*[19] without any procedural safeguards required by due process, ~~at the suggestion of the state governor.~~[19]

Function of the Concept of Procedural Due Process

The content of this concept is the actual acts that are extensions of the form of the concept. The continuum discerns some of the content of the concept. It does not distinguish the function of the concept. The function of a concept can be seen by studying the language of school policy. School policy statements are statements of norms. These normative statements are statements for schools made by legally constituted governing bodies. In these statements can be found that the concept of procedural due process is functioning and how it is functioning.

The concept of ~~poreedural~~ procedural due process is one which functions as a process concept. Out of the process emerges a product. The product is substantive due process. From planning or designing for honesty and impartiality dynamically emerges the moral and legal right of individuals to life, liberty, and property. From procedural due process emerges substantive due process.

Meaning and the Concept of Procedural Due Process

Meaning[20] is in the understanding of the structure of a concept. Meaning can be lost: if the concept of procedural due process is not taken to be functioning as a process concept out of which emerges substantive due process; if the content of the concept of procedural due process is not discerned by perceiving a continuum of a model case, a borderline case, and a contrary case; if the form of the concept of procedural due process is not defined in terms of planned honesty or designed impartiality; and if the purpose of the concept of procedural due process is mistaken to be identical with the purpose of a scientific or moral concept.

Loss of meaning can cause practical inquiry in educational administrative decision making to go awry. Understanding the analytical pragmatic structure of a concept and applying it to practical inquiry in educational administrative decision making can keep this from happening. The structure of form, purpose, content, and function is a framework by which meaning can be sought and attained in reasoning about what is the right thing to do in schools. It is a framework for practical inquiry in educational administrative decision making.

FOOTNOTES

1. Procedural due process is devised to protect substantive rights pursuant to the fourteenth amendment, U.S. Constitution, "No state shall ...deprive any person of life, liberty, or property without due process of law..."

2. There is a distinction between practical inquiry and theoretical inquiry. Practical inquiry is inquiry about what is the right or correct thing to do. Theoretical inquiry is inquiry about what is true. Ethics is an example of practical inquiry and mathematics is an example of theoretical inquiry.

3. The term 'law' can be used to name a field of inquiry and to name an act. When naming a field of inquiry it names a field of practical inquiry. The question being answered in the practical field of legal inquiry is "What is the legally right or correct thing to do?" The act of doing and not doing the legally correct thing is a 'lawful act' or an 'unlawful act'. Action is incited to be legal by concepts formed in the field of inquiry named 'law'.

4. The term 'conceptualization' is not to be taken to mean the same as the term 'imagination'. The difference between the two terms is the difference between the meaning of 'concept' and 'image'. The term 'concept' is best taken to mean 'language habit'. The term 'image' is best taken to mean 'mental picture'. Systems analysis can be a culprit here because it disposes one toward using images of flow charts more than concepts formed by definition. For discussion about this distinction see Raymond J. McCall's, Basic Logic, New York: Barnes and Noble, Inc., 1952, chapter two.

5. A statement is a sentence. A statement of legal norm is a sentence that contains terms that express legal concepts. The norm that fits the context of this paper is "All schools should follow procedural due process." This is normative in that it is a sentence directing someone to do something. It is a legal norm in that it contains the term "procedural due process' which expresses a legal concept.

6. The term 'decision making' functions ambiguously. Some of the ambiguity can be removed by distinguishing between two kinds of decision making. There is practical decision making and theoretical decision making. There are decisions about what to do and there are decisions about what is true. Lee J. Cronbach and Patrick Suppes in Research For Tomorrow's Schools, New York: The Macmillan Company, 1969 use the terms 'conclusion-oriented inquiry' and 'decision-oriented inquiry'. These terms parallel 'theoretical inquiry' and 'practical inquiry'. Another distinction that helps remove the ambiguity of the concept of decision making is that between the concepts of choice and decision. By definition a choice can be irrational or impulsive but a decision must be rational or deliberative.

For a discussion on this distinction see Paul W. Taylor's Normative Discourse, New York: Prentice Hall, Incorporated, Englewood Cliffs, 1961, pages 36-37. This book is one in the logic of practical decision making, i.e. logic of practical inquiry or logic of practical reasoning.

7. The term 'analytical pragmatic' is Elizabeth Steiner Maccia's term. See her unpublished manuscript Methodology of Educational Inquiry, revised, Indiana University, 1971, page 18. The term was used by James E. Fisher in his unpublished dissertation Analytical Pragmatics and Its Relevance For Classroom Language Classification, Indiana University, 1971. In this work he distinguishes between analytical pragmatics and behavioral pragmatics. The concept expressed by 'structure' is from Maccia's work. The way it is formed and used in this paper, however, may not be exactly as she would form and use it.

8. The definition of 'structure' being used in this paper is the interrelationship of form, purpose, content, and function.

9. For a recent work on definition in education see Jerome A. Popp's unpublished dissertation Methodology of Definition In The Science of Education, Indiana University, 1970.

10. Reference for this definition of 'procedural due process' is Gould v. Looney, 304 N.Y.S. 2d 537, 540, 60 Misc. 2d 973.

11. For further reference of this definition see Pipes Trades v. Rauch, 2 Ill. 2nd. 278, 1954.

12. For an understanding of the way the concept of purpose is functioning in this paper see Fisher's Analytical Pragmatics cited in footnote seven. For a more general treatment see Charles Morris' Signs, Language and Behavior; New York: Prentice Hall, Incorporated, 1946, Chapter V, "Types of Discourse."

13. Brown v. Dunne, 409 Fed 341, 1969.

14. US exrel Hall v. People of the State of Illinois, 329 Fed. 354, 1964

15. For a general treatment on how the terms 'good' and 'bad' function in a language context and on the logic of practical inquiry or practical decision making see Paul W. Taylor's The Moral Judgment; New Jersey: Prentice Hall, Incorporated, Englewood Cliffs, 1963, Chapter V, "New Directions in Meta-Ethics,"

16. For discussion about the concept of rationality see Michael Scriven's Primary Philosophy; New York: McGraw-Hill Book Company, 1966, Chapter II "Knowledge."

17. For work on inquiry, reasoning, or decision making using model, borderline and contrary cases of a concept see John Wilson's Thinking With Concepts, Cambridge University Press, 1971, Chapter I "The Business of Analysis."

18. Eiden Miller v. Board of Education of Community High School District No. 505, Bureau County 28 Ill. App. 2d 90, 1961

19. Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961)

20. The concept of meaning is discussed in C.K. Ogden's and I.A. Richard's The Meaning of Meaning; New York: Harcourt, Brace and World, Incorporated, 1923.